STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals:
White, P.J, and Murphy and Fitzgerald, JJ.

RICHARD ADAM KREINER,

Appellee,

vs.

ROBERT OAKLAND FISCHER,

Appellant.

Supreme Court No. 124120
Court of Appeals No. 225640
Lapeer Circuit No. 98-026072-NI

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AMICUS CURIAE BRIEF OF THE COALITION PROTECTING AUTO NO FAULT
ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The Coalition Protecting No Fault does not contest this Court's jurisdiction.

STATEMENT OF QUESTIONS INVOLVED

I. WHETHER THE DEFINITION OF A SERIOUS IMPAIRMENT IN MCL 500.3135(7) REQUIRES A CASE-BY-CASE FACTUAL ANALYSIS THAT TAKES A BROAD AND PERSONAL VIEW OF THE EFFECTS OF INJURIES ON A PLAINTIFF'S GENERAL ABILITY TO LEAD HIS OR HER NORMAL LIFE?

Plaintiff-Appellee Answers: Yes.

Defendant-Appellant Answers: No.

Trial Court Answers: Yes.

Court of Appeals Answers: Yes.

II. DO THE THEORETICAL UNDERPINNINGS OF NO-FAULT LIABILITY SCHEMES SUPPORT THE CASE-BY-CASE FACTUAL ANALYSIS THE COURT OF APPEALS ARTICULATED IN *KREINER II*?

Plaintiff-Appellee Answers: Yes.

Defendant-Appellant Answers: No.

Trial Court Answers: Yes.

Court of Appeals Answers: Yes.

I. INTRODUCTION

The Coalition Protecting Auto No Fault ("CPAN") is a broad-based group formed to preserve the integrity of Michigan's model no-fault automobile insurance system. CPAN's member organizations and associations range from major medical organizations and patient advocacy groups directly involved in first-party no-fault issues, to consumer groups that have members directly concerned with third-party benefits. CPAN's membership is comprised of thirteen medical provider groups and twelve consumer organizations:

CPAN: Coalition Protecting Auto No Fault	
Medical Provider Groups	**Consumer Organizations**
Michigan Academy of Physicians Assistants	Brain Injury Association of Michigan
Michigan Assisted Living Association	Disability Advocates of Kent County
Michigan Association of Centers for Independent Living	Michigan Paralyzed Veterans of America
Michigan Brain Injury Providers Council	Michigan Partners for Patient Advocacy
Michigan Chiropractic Society	Michigan Protection and Advocacy Services
Michigan College of Emergency Physicians	Michigan Rehabilitation Association
Michigan Dental Association	Michigan Citizens Action
Michigan Health & Hospital Association	Michigan Consumer Federation
Michigan Home Health Care Association	Michigan State AFL-CIO
Michigan Orthopedic Society	Michigan Trial Lawyers Association
Michigan Osteopathic Association	Michigan Tribal Advocates
Michigan Orthotics and Prosthetics Association	Michigan UAW
Michigan State Medical Society	

CPAN and its members are concerned about the effect altering the threshold for recovering third-party no-fault claims for noneconomic injuries will have on the victims of automobile accidents both as it relates to health issues and as it relates to consumer issues. CPAN believes Michigan has a superior no-fault system and was formed for the very purpose of preserving quality health care and victim's rights, which are so vital to its proper functioning. Open access to health care providers, prompt and adequate medical care, reasonable choice of service, and fair and just treatment of accident victims are all part of CPAN's mission. In particular, CPAN's members are concerned that raising the verbal threshold for noneconomic damages, and thereby making it harder for injured victims to sue tortfeasors, will increase the number and severity of motor vehicle accidents in Michigan by eliminating or substantially reducing the deterrent effect tort liability provides. Moreover, CPAN believes that increasing the tort threshold will cause instability in the Michigan no-fault scheme by disrupting the delicate balance that must exist between the first-party and third-party components of the system, thereby threatening its continued viability in both areas. Thus, CPAN urges this Court to adopt the correct interpretation of MCL 500.3135(2) that the Court of Appeals used in deciding this case on remand because it strikes the proper and reasonable balance between discouraging inefficient and frivolous litigation while compensating victims and deterring accidents.

II. MATERIAL FACTS AND PROCEDURE

Like all plaintiffs in no-fault cases, Plaintiff Richard Adam Kreiner sustained injuries in a motor vehicle accident. *Kreiner v Fischer*, 251 Mich App 513, 517; 651 NW2d 433 (2002) ("*Kreiner I*"). After complaining that the accident with Defendant Robert Fischer had injured his lower back, right hip, and right leg, causing him pain, he submitted to medical testing. See *id.* These objective tests indicated that he had "radiculopathy, or a malfunction, of the L4 nerve root,

grade one to grade two spondylolysis [arthritic like changes] between the L5 and S1 locations, degenerative disc disease, and facet degenerative changes," as well as other nerve irritation, stiffness, and tenderness. See *id.* His physician attributed at least part of his problems – which reduced his ability by twenty-five percent – to a trauma, noting that it was unusual for a person his age to have developed degenerative disc disease. See *id.* at 517, n 2, 518-519. Though Kreiner's physician was not certain whether the L4 radiculopathy might heal, the physician concluded that Kreiner's disc disease was never going to improve. See *id.* at 517. Kreiner claimed that, as a result of his injuries, he was not able to lead his normal life because he experienced pain while working as a carpenter, could not work his customary eight-hour workday, perform roofing work, work on a ladder for "more than twenty minutes at a time," "lift more than eighty pounds," "walk more than one-half mile," or enjoy certain types of "recreational hunting." *Id.* at 518-519.

In ruling on the threshold issue as required under MCL 500.3135(2), the trial court considered the objective medical evidence of Kreiner's injuries, as well as these limitations on his life since the accident. *Kreiner I*, *supra* at 518.

> The trial court found that plaintiff's injuries were objectively manifested on the basis of the medical examinations and tests, and that the impairment involved an important body function, thereby satisfying the first two prongs of the statutory definition of serious impairment of body function. [*Id.*]

Nevertheless, the trial court concluded that Kreiner's injuries were not "'serious enough' to impinge on [Kreiner's] ability to lead a normal life," and therefore he did not pass the threshold that would allow him to sue for noneconomic damages. *Id.* Consequently, the trial court granted summary disposition in favor of Fischer. *Id.* at 514.

Kreiner appealed to the Court of Appeals, which agreed that, as a matter of procedure, the trial court had correctly determined the threshold issue as a matter of law, as MCL 500.3135(2)(a) requires. Though the Court of Appeals also agreed with the trial court that Kreiner had demonstrated that his injuries were objectively manifested and impaired an important body function, it concluded that the trial court had misapplied the "normal life" language in MCL 500.3135(7) when determining whether Kreiner had sustained a serious impairment. *Id.* at 518. In the Court of Appeals' view,

> [t]he statutory definition of serious impairment in MCL 500.3135(7) can be broken down into three requirements that must be established in order to find a serious impairment of body function. First, there must be an objectively manifested impairment. Second, the impairment must be of an important body function. Third, the impairment must affect a person's *general ability to lead his or her normal life*. [*Id.* at 516-517 (emphasis added).]

In other words, the trial court's mistake was to look to whether Kreiner's injury was "serious enough" instead of examining whether it impaired his general ability to lead his normal life. *Id.* at 518. In fact, the Court of Appeals observed, work was a part of Kreiner's normal life and his injuries generally limited his abilities to carry out his chosen profession. *Id.* at 519, n 6. Despite the trial court's error, the Court of Appeals did not reverse and remand for summary disposition in Kreiner's favor. *Id.* Rather, the Court remanded the case to the trial court to determine whether any material dispute existed concerning "the effect of the injury on his ability to work" that would require trial. *Id.* at 519.

Before the trial court could take up this factual issue, Fischer appealed to the Supreme Court. In lieu of granting Fischer's application for leave to appeal, the Supreme Court entered a lengthy order vacating *Kreiner I* and remanding the case to the Court of Appeals. *Kreiner v*

Fischer, 661 NW2d 234 (2003). The order criticized both the interpretation of MCL 500.3135 advanced in the trial court and the Court of Appeals. *Id.* As the Court put it, "both the circuit court and the Court of Appeals erred. Although a *serious* effect [on the ability to lead the plaintiff's normal life] is not required, *any* effect does not suffice either." *Id.* (Emphasis in the original). Consequently, the Court remanded this case to the Court of Appeals with instructions for the Court of Appeals "to consider whether plaintiff's impairment affects his general ability to lead his normal life." *Id.*

On remand to the Court of Appeals, the Court took up the narrow issue the Supreme Court had identified regarding the meaning of a serious impairment of a body function as defined in MCL 500.3135(7). See *Kreiner v Fischer*, 256 Mich App 680, 681; 671 NW2d 95 (2003) ("*Kreiner II*"). The Court expressly adopted that part of its first opinion analyzing the circumstances under which it is appropriate for a trial court to decide the threshold issue as a matter of law. *Id.* at 682-683. The Court also adopted its earlier recitation of the rules of statutory construction, its conclusion that MCL 500.5135(7) can be divided into three elements, and the description of the evidence of Kreiner's injuries. *Id.* at 684-685.

Turning to the Supreme Court's question, the Court of Appeals first clarified that, in *Kreiner I*, it had not concluded that "*any* effect" will satisfy MCL 500.5135(7). *Kreiner II*, *supra,* at 686 (emphasis in the original). Instead, the Court said:

> To the extent that our earlier opinion can be read to implicitly suggest that *any* effect will suffice, and consistent with the Supreme Court's remand order, we now make clear that *any* effect does not suffice to establish a serious impairment of body function under MCL 500.3135, rather the effect must relate to a person's general ability to lead his or her normal life. This leads to the issue regarding the meaning of the phrase "affects the person's general ability to lead his or her normal life." MCL 500.3135(7).

> The Supreme Court's remand order stated that the effect of the injury must be on one's *general* ability to lead his or her normal life. The Court emphasized the word "general," thereby indicating that we had failed to properly take the term into consideration in our analysis. The Supreme Court did not expand or explain in any detail its position. [*Kreiner II*, *supra,* 686-687 (emphasis in the original).]

The Court of Appeals viewed the Supreme Court's remand order as suggesting that, to have a sufficient effect on a person's "general ability to lead his or her normal life," the injuries must affect "multiple aspects of the person's life, *i.e.,* home life, relationships, daily activities, recreational activities, and employment, and not solely on one area of the person's life such as employment." *Id.* at 689. However, the Court noted, employment may play a "significant role" in what constitutes a person's normal life, and therefore the inability or reduced ability to work may have a widespread impact on a person's normal life. *Id.* Further, the Court observed, "injuries affecting the ability to work, by their very nature, often place physical limitations on numerous aspects of a person's life." *Id.*

With this interpretation of the statute in mind, the Court of Appeals then examined the evidence on the record concerning the effect the injuries had on Kreiner. The Court of Appeals directly rejected the notion that the fact that Kreiner was able to return to work following his accident meant that his injuries did not affect his general ability to lead his normal life. *Kreiner II*, *supra,* at 689-690. Instead, the Court noted that Kreiner had been forced to give up approximately one-quarter of his work because of the physical limitations his injuries caused. *Id.* at 689. "These limitations, if proved, are significant enough to support a finding that plaintiff's impairment affected his general ability to lead his normal life," stated the Court. *Id.* at 690. As a result, the Court adopted its previous holding reversing the trial court, but modifying the instruction to the trial court on remand so that it would "determine whether there are material

issues of fact regarding plaintiff's claims relative to the effect of the injury on his [general] ability to [lead his normal life]." *Id.* (alterations in *Kreiner II*).

Again, before the case could be remanded to the trial court, Fischer appealed to the Supreme Court. This time, the Supreme Court granted leave to appeal, and in doing so, ordered that this case be consolidated with the appeal from *Straub v Collette (On Remand)*, 258 Mich App 456; 670 NW2d 725 (2003). See *Kreiner v Fischer*, 671 NW2d 55 (2003). As in *Kreiner*, the key legal question in *Straub* was whether the plaintiff's injury affected his general ability to lead his normal life, a subjective standard that the trial court had misapplied. *Straub*, *supra,* at 460. The Court of Appeals concluded that the plaintiff's hand injuries, which kept him from working at his job as a cable line repairman for three months, affected his ability to perform personal tasks, kept him from hunting as he had done in the past, prevented him from playing in his band for several months, and permanently altered the way he played his bass guitar did affect his general ability to lead *his* normal life. *Id.* at 461-463. Though the Court acknowledged that it had previously emphasized the plaintiff's inability to play his bass guitar as evidence of his serious impairment, this was only one of a number of factors indicating that the plaintiff had suffered a serious impairment. *Id.* at 462.

Now, the Supreme Court is presented with an opportunity to clarify the meaning of MCL 500.3135(7). Though the Supreme Court has not asked the parties to address any specific questions in their briefs, the Court's remand order in *Kreiner* suggests that the key question in this case revolves around what constitutes a person's general ability to lead his or her normal life to satisfy this threshold question. See *Kreiner v Fischer*, 661 NW2d 234 (2003). Indeed, the issue Fischer has defined on appeal relates to this analysis of an effect on a person's general ability to lead his or her normal life.

As CPAN explains below, there is no basis in the statutory language to employ anything other than a case-by-case analysis when determining this general ability issue, including an examination of the particular effects from an injury that a plaintiff claims. This is the only interpretation of the statute that can be viewed as effectuating the Legislature's intent to strike a balance between the efficiencies and savings of a no-fault system and the need to compensate accident victims. To adopt Fischer's interpretation of the statute, which would raise the threshold, would directly thwart this legislative intent. Therefore, as the Court of Appeals in *Kreiner II* indicated, an injury that affects specific aspects of a plaintiff's life that, nonetheless, affect that person's general ability to lead his or her normal life is sufficient to pass the no-fault threshold for third-party liability.

III. STANDARD OF REVIEW

This case involves a question of statutory interpretation, which requires review de novo. See *McCauley v General Motors Corporation*, 457 Mich 513, 518; 578 NW2d 282 (1998).

IV. STATUTORY CONSTRUCTION

This Court has emphasized time and time again that "[t]he fundamental rule of statutory construction is to give effect to the Legislature's intent. That intent is clear if the statutory language is unambiguous, and the statute must then be enforced as written." *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347; 656 NW2d 175 (2003) (citation omitted). The words in a statute must be given their plain or commonly-understood meaning, but any definition the Legislature supplies in a statute controls their meaning. See MCL 8.3a; see also *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159-160; 645 NW2d 643 (2002); *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). The structure, subject, and context of the statute ordinarily provide information regarding this meaning See *id*; see also *People v Vasquez*, 465

Mich 83, 89; 631 NW2d 711 (2001) (Markman, J.). Not surprisingly, then, courts are bound to give effect to all the words in a statute, and if possible, harmonize any conflicts that exist See *Nowell v Titan Ins Co*, 466 Mich 478, 482; 648 NW2d 157 (2002); *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002).

V. THE DEFINITION OF A SERIOUS IMPAIRMENT OF BODY FUNCTION IN MCL 500.3135(7) REQUIRES A CASE-BY-CASE FACTUAL ANALYSIS THAT TAKES A BROAD AND PERSONAL VIEW OF THE EFFECTS OF INJURIES ON A PLAINTIFF'S GENERAL ABILITY TO LEAD HIS OR HER NORMAL LIFE

In Federalist Paper No. 78, Alexander Hamilton hypothesized that the judiciary is "incontestably" the "weakest of the three departments of power," having a "natural feebleness" that leaves it "in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches." Hamilton, The Federalist Papers, No. 78 (New York: Mentor – Penguin Books, 1961), p. 465-466. While Hamilton correctly observed the differences in the constitutional powers reserved to each of the branches of government, he did not accurately predict the degree of influence the courts exert over the legislative branch of government when exercising their "proper and peculiar province" of interpreting the law. *Id.* at 467. For decades, Michigan's courts and its Legislature have engaged in an active dialogue seeking a common understanding of the right to compensation for injuries sustained because of an automobile accident, with the Michigan Supreme Court often leading this dialogue's direction. At times, the public has joined in this debate, reigning in efforts to change the no-fault scheme radically. With the Legislature's most recent no-fault legislation creating the statutory language at issue in this case, the courts and the Legislature have finally settled on their proper roles and have created a scheme that need not and should not be disturbed.

A. No-Fault's Early History In The Courts

Michigan's courts first contributed their voice to this dialogue more than thirty years ago, soon after the Legislature enacted the No-Fault Act, 1972 PA 294, codified at MCL 500.3135. In 1973, the No-Fault Act provided, "A person remains subject to tort liability for noneconomic loss caused by his ownership, maintenance or use of a motor vehicle *only if the injured person has suffered* death, *serious impairment of body function* or permanent serious disfigurement." Emphasis added. In response to questions posited by the Governor and Senate, this Court addressed the meaning of the language in this provision concerning serious impairment of body function in *Advisory Opinion Regarding Constitutionality of 1972 PA 294*, 389 Mich 441, 460, 477-481; 208 NW2d 469 (1973). In the *Advisory Opinion*, this Court held that the statutory phrases were "within the province of the trier of fact and are sufficient for legal interpretation." *Id.* at 481. In other words, serious impairment of body function was ordinarily a question of fact for the jury unless reasonable minds could not differ with respect to the nature of the injury, making summary disposition appropriate. *Id.* at 478; *Vitale v Danylak*, 74 Mich App 615, 618-619; 254 NW2d 593 (1977). At the same time, an injury did not need to be life threatening or permanent to meet this threshold. See *Burk v Warren*, 105 Mich App 556, 566-567; 307 NW2d 89 (1981).

In 1982, the Supreme Court changed course with its interpretation of the serious impairment threshold. In *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982), this Court took the question whether an impairment was serious from the jury's hands, making this threshold question a legal matter for the court to decide. *Id.* at 494. *Cassidy* also attempted to clarify what constituted a "serious impairment of body function." *Id.* The Court, hoping to strike a balance between what it saw as inconsequential injuries and life-threatening injuries,

concluded that to recover third-party no-fault benefits, the plaintiff must have sustained a serious impairment of an "important body function" and the injury must be "objectively manifested." *Id.* at 504-505. The Court also added a new concept to this threshold test, requiring that injuries affect a plaintiff's "general ability to live *a* normal life" in order to recover third-party no-fault benefits. *Id.* at 505. In the absence of guidance regarding this normal life standard, this new "objective" test raised the threshold, making it harder to recover third-party no-fault benefits.

DiFranco v Pickard, 427 Mich 32; 398 NW2d 896 (1986) presented the Supreme Court with an opportunity to retreat from the harsh objective test it had created in *Cassidy*. In *DiFranco*, the Supreme Court acknowledged that it had decided *Cassidy* on the basis of language that did not appear in the statute. *DiFranco* unequivocally returned the threshold question to the jury in cases in which reasonable minds could differ, rejected case law that had required injuries be subject to medical measurement, and eliminated *Cassidy's* requirements that an injury impair an "important" body function and affect "a normal life." *Id.* at 50-51, 61, 67, 75. Instead, *DiFrano* returned to the language of the statute, and instructed courts to look at whether an injury impaired a body function, and whether that impairment was serious. *Id.* at 67. *DiFranco* thus eliminated lawsuits for "clearly minor injuries," while clarifying that there are a range of injuries compensable in the third-party no-fault system, not simply the catastrophic injuries that could pass *Cassidy*. *Id.* at 60.

B. The Ballot Proposals

The Legislature passed a variety of pieces of insurance legislation because of Michigan Supreme Court opinions related to the no-fault insurance regime. See, e.g., 1979 PA 145 and 147, enacted in response to *Shavers v Attorney General*, 402 Mich 554; 267 NW2d 72 (1978). Yet, by the early 1990s, the Legislature had not been able to pass legislation concerning the

verbal threshold for third-party claims in reaction to the *Cassidy* and *DiFranco* opinions, and the lower court opinions applying their reasoning and holdings. See Citizens Research Counsel of Michigan, *Statewide Ballot Proposals – II: Proposal D: No-Fault Insurance*, Council Comments No. 1011, September 1992 (visited February 24, 2004) <http://www.crcmich.org/PUBLICAT/1990s/1992LIST.HTM>. Accordingly, in 1992 the People placed Proposal D, an initiative, on the ballot. *Id.* at 1. Proposal D would have limited no-fault PIP allowable expense benefits for personal injuries resulting from an accident to $250,000 and raised the verbal threshold for injuries by precluding a finding of serious impairment "unless the person has suffered an objectively manifested impairment of an important body function that affects his or her general ability to lead a normal life." *Id.* However, Proposal D was "soundly rejected" at the polls. *Munson Medical Center v Auto Club Ins Ass'n*, 218 Mich App 375, 390; 554 NW2d 49 (1996); see also historical notes following MCL 500.3135.

The Legislature then made an effort to amend the No-Fault Act by enacting 1993 PA 143. After a successful petition drive to place the matter to a vote of the People pursuant to 1963 Const, art 2, § 9, 1993 PA 143 was suspended pending a referendum vote on Proposal C at the 1994 general election. See Citizens Research Counsel of Michigan, *Statewide Ballot Proposals – II: Proposal C: No-Fault Insurance*, Council Comments No. 1031, October 1994 (visited February 24, 2004) <http://www.crcmich.org/PUBLICAT/1990s/1992LIST.HTM>. Proposal C would have required plaintiffs to demonstrate that their injuries were an objectively manifested impairment of an important body function and would have required that judges determine whether an injury passed this threshold instead of juries, among other things. *Id.* at 3. Again, voters rejected this effort to change the law. See *Munson*, *supra* at 387, n 4.

C. The Legislature Speaks Again, Finding A Reasonable Compromise Between *Cassidy* and *DiFranco* In Enacting 1995 PA 222 That Requires A Case-By-Case Factual Analysis Of The Threshold Issue

After allowing the *DiFranco* legal regime to function for almost a decade, and without any success with ballot proposals, the Legislature finally reinserted itself in the debate regarding the appropriate threshold to require for a person injured in an automobile accident to recover under the third-party no-fault system by enacting 1995 PA 222. Act 222 left the language in the statute requiring a "serious impairment of body function" unchanged. See MCL 500.3135(1). However, Act 222 did specify a number of conditions that had been imposed under case law at different times, but had never previously appeared in the statutory language. For instance, more in line with *Cassidy* than *DiFranco*, Act 222 inserted a new subsection 2 reserving the threshold question for a court as a matter of law in most, though not all, cases. See MCL 500.3135(2)(a). For the first time, the Legislature also endeavored to define what constitutes a "serious impairment of body function," stating, "As used in this section, 'serious impairment of body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). This is the statutory language in dispute in this case.

This definition of a serious impairment in MCL 500.3135(7) can be broken down into its individual elements: (1) an objectively manifested impairment; (2) of an important body function; (3) that affects the person's general ability to lead his or her normal life. This is the proper division of elements in this statutory provision because the word "of" indicates that the words "objectively manifested impairment" modify the words "important body function." The word "that" signals an essential clause, meaning the sentence would not be complete without the information in that ending clause. Cf. William A. Sabin, *The Gregg Reference Manual* (9th ed),

p 556. In this case, there is no dispute that Kreiner has objectively manifested impairments of important body functions. Rather, the dispute revolves around whether these impairments affect his general ability to lead his normal life.

As both the Court of Appeals and Supreme Court noted, nothing in the language of this statute requires the effect on a person's general ability to lead his or her normal life to be "serious" to pass this threshold, as the trial court incorrectly concluded. See *Kreiner v Fischer*, 661 NW2d 234 (2003); *Kreiner I, supra* at 518. With all due respect, though the Supreme Court suggested in its remand order that "not any effect" will satisfy MCL 500.3135(7), nothing in the language of this statute actually modifies the verb "affects" to give a sense of the magnitude of the effect that the Legislature intended in order to pass this threshold. Compare, generally, *People v Ward*, 211 Mich App 489, 491-492; 536 NW2d 270 (1995) (statute used language that modified intent). Because courts may not "judicially legislate" by adding language to a statute, the absence of a modifier in this statute means that, in fact, any "affecting" *will* suffice. *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 421; 565 NW2d 844 (1997).

The only language in MCL 500.3135(7) that gives context to how the impairment must affect a person for the purpose of this threshold question comes from the words "general ability to lead his or her normal life." In this context, "general ability" modifies the person's capacity to lead his or her normal life. While Fischer quotes dictionary definitions that suggest that a "general ability" is the opposite of a "particular ability," his contention is that the Legislature substantially raised this threshold to bar more claims, but it is incorrect. *Cassidy, supra,* provided a model for a high threshold to bar claims, but the Legislature did not return to the objective standard *Cassidy* articulated when passing Act 222. In other words, *Cassidy* raised the threshold for an injury by requiring that it generally affect a person's ability to lead "a" normal

life. The problems with defining what constitutes this standard, and therefore what is "normal," are manifest from the many variations in the day-to-day lives people lead. See *DiFranco*, *supra* at 62.

Had the Legislature used *Cassidy* as the basis for Act 222, it might be possible to develop a categorical or check-list approach to defining when a person's "general ability" to lead "a" normal life has been affected. For instance, under a *Cassidy* approach, it is conceivable that courts might require that a plaintiff demonstrate that injuries affect a plaintiff's ability to work, feed and dress himself, and ambulate in order to meet this "general ability" requirement. In Fischer's view, an injury must affect a plaintiff in so many ways that it can be characterized as pervasive, catastrophic, or totally and permanently disabling in order for third-party benefits to be available and moves quite close to this categorical approach[1]. In fact, some legal schemes involving disabilities have categorized the aspects of a person's life that, if permanently impaired, entitle the plaintiff to recover. See, generally, *Stevens v Inland Waters, Inc*, 220 Mich App 212, 217-218; 559 NW2d 61 (1996) (defining categories relevant to determining disability under federal law concerning disabilities). However, it is critical to remember that this case involves *injuries* that would be compensable under traditional tort theory were it not for the No-Fault Act, and *not* special civil rights and related legislation that provides compensation for *disabilities*. Therefore, the stringent categorical approach that might be appropriate in those other contexts is not relevant in this case involving injuries.

[1] Indeed, Fischer asks this Court to take the Legislature's definition of "serious impairment of body function" and add the word "serious" to the definitional section. (Defendant's Brief, p. 24.) This would constitute judicial legislation. Three significant elements (see page 14 above) have been created to inform what shall constitute serious impairment. "Seriously affecting" is not one of them.

More importantly, the Legislature did *not* adopt *Cassidy* and its harsh objective standard when it enacted Act 222. Rather, the Legislature adopted a subjective standard focusing on what constituted the ordinary life the plaintiff led before the accident, which is why the statute refers to "his or her normal life." MCL 500.3135. Because this is a subjective standard, and there truly is no such thing as "a" single standard for a normal life, there can be no clear categories of activities that help to define what constitutes a person's "general ability to lead his or her normal life." Fischer's argument that a court may not look to the particular ways in which an injury affects a plaintiff's life in order to determine whether the injury passes this threshold is fatally flawed because it is impossible to look at injuries without identifying their specific effects. That would essentially assign equal relevance to many different facets of a person's life, and therefore require injuries to alter multiple aspects of a person's life in order to have an effect on the person's "general ability to lead his or her normal life." The "general ability" wording in MCL 500.3135(7) acknowledges that each person's normal life is the indivisible sum of many individual components, some of which are more important than others to that person's whole life. Thus, this "general ability" wording reinforces the subjective nature of the definition in MCL 500.3135(7), serving as the Legislature's instruction to view the effects of an injury on a person's ability to lead his or her normal life in the *overall context* of that person's life.

The many opinions interpreting the No Fault Act gave the Legislature fair warning that defining what constitutes a serious impairment is a difficult task. In fact, "[t]he Legislature is presumed to be aware of existing judicial interpretations of the law when passing legislation." *Dean v Chrysler Corp*, 434 Mich 655, 667, n 8; 455 NW2d 699 (1990). Had the Legislature wanted a definition of serious impairment with more tangible outlines and stricter application, whether permitting or barring third-party claims, it would have provided that definition in MCL

500.3135(7). See *DiFranco*, *supra* at 48. That the Legislature chose a subjective standard for determining what constitutes a serious impairment despite the debate in the case law regarding serious impairment leads to two logical conclusions in this instance.

First, contrary to Fischer's argument, the Legislature specifically rejected raising this threshold issue to bar more claims, and therefore this Court should not interpret MCL 500.3135(7) in a way that raises this threshold and makes recovery of noneconomic damages more difficult. Second, the Legislature understands that the only workable test for this subjective threshold determination requires a fact-specific inquiry into what constituted the plaintiff's normal life before the injuries, and whether the injuries *viewed in context* have affected the plaintiff's ability to lead his or her normal life. No, this is not an easy inquiry, and yes, this requires looking at the plaintiff's particular injuries and the effects that they have had. However, trial courts are often charged with making difficult determinations. It is only logical that after more than thirty years of handling no-fault cases, the Legislature has come to trust the way the courts handle these issues and has chosen not to interfere with the flexibility this standard permits the courts. In this most recent stage of the dialogue between the Judiciary and the Legislature, these two branches of government have finally come to agreement concerning the reasonable – not overly high or low – standards needed to encourage no-fault's systemic goals.

This Court should not do what the Legislature has chosen to avoid in this statutory scheme – impose unnecessarily stringent requirements for recovery by reading language into the statute that does not exist. As explored below, the availability of noneconomic damages plays an important role in the balance the No-Fault Act strikes between efficiency and costs savings, compensation for the injured, and deterrence of further accidents. Consequently, this Court should avoid interpreting MCL 500.3135(7) in a way that interferes with the trial court's ability

to make the threshold determination on the basis of the evidence germane in a particular case when the Legislature did not intend that to occur.

D. The Court Of Appeals Correctly Decided *Kreiner II*

The Court of Appeals in *Kreiner* correctly grasped the connection between the subjectivity of MCL 500.3135(7) and the Legislature's intent that courts apply a fact-specific, context-driven analysis of serious impairment that is personal to the plaintiff in each case. As the Court of Appeals acknowledged in *Kreiner II*, "[O]ne's general ability to lead his or her normal life can be affected by an injury that impacts the person's ability to work at a job, where the job plays a significant role in that individual's normal life . . . ." *Kreiner II*, *supra* at 688. In other words, the Court of Appeals properly concluded that, under MCL 500.3135(7), the inquiry first looks at the attributes of the plaintiff's pre-injury life to get a sense of the plaintiff's normal life. Only then is it appropriate to look at the plaintiff's injuries and determine whether they affected his normal life as a whole.

In Kreiner's case, the ability to work played a significant role in his normal, pre-injury life, which is to be expected both from income and social value perspectives. *Kreiner II*, *supra,* at 688. There can be no doubt from the evidence on the record that the injuries he sustained affected his general ability to lead his normal life because it reduced his ability to work by twenty-five percent and also altered the type of work he could do. *Id.* at 690. Further, the Court of Appeals did not view this effect on Kreiner's ability to work "in a vacuum." *Id.* at 689. Instead, the Court noted that "injuries affecting the ability to work, by their very nature, often place physical limitations on numerous aspects of a person's life." *Id.* For instance, "there was documentary evidence presented by plaintiff that his ability to walk, undertake certain physical movements, and engage in recreational hunting was limited by the injury." *Id.* at 689. The

Court of Appeals' thoughtful analysis in *Kreiner II* is a good example of a court looking at the subjective factors relevant to a plaintiff's general ability to lead his or her normal life and coming to the correct conclusion that the plaintiff's injuries pass the serious impairment threshold.

The *Straub* opinion, which relied on the analysis in *Kreiner II*, also demonstrates that *Kreiner II* provides a workable and appropriately subjective standard that should be used for this statutory question in the future. As in *Kreiner*, the *Straub* Court looked at the wide array of aspects of a person's life in order to get a sense of what the plaintiff's normal life was like before his accident. *Straub*, *supra* at 461. The Court then examined the ways in which the plaintiff's injuries had changed his life. See *id.* at 461-462. Because the Court already had a sense of what constituted the plaintiff's normal life before the accident, it was able to determine whether those particular injuries affected his normal life as a whole. See *id.* Like Kreiner, the plaintiff in *Straub* had aspects of his normal life that were more important than others, such as playing music. See *id.* Because the plaintiff's injury affected his ability to engage in those activities, it altered his normal life, and the *Straub* Court fairly and correctly determined that he had sustained a serious impairment. *Straub* illustrates that the analysis from *Kreiner II* is so workable because it allows courts both to conceptualize the plaintiff's normal life and to examine whether and how that life changed because of injuries sustained in an accident. Thus, this Court should affirm the result and application of *Kreiner II* in this case.

VI. THE THEORETICAL UNDERPINNINGS OF NO-FAULT LIABILITY SCHEMES SUPPORT THE CASE-BY-CASE FACTUAL ANALYSIS THE COURT OF APPEALS ARTICULATED IN *KREINER II*

Automobile no-fault systems in the United States are, by no means, uniform in their design or effectiveness. Some states retain a traditional tort system that allows accident victims to sue to recover for their economic and noneconomic damages; some states permit consumers to

elect whether to participate in the no-fault system; other states use a monetary threshold to determine when victims can sue for damages; while states like Michigan use a verbal threshold, which describes the types of injuries for which victims may seek to recover noneconomic damages. See Insurance Information Institute, *No-fault auto insurance*, November 2003 (visited March 5, 2004) <http://www.iii.org/media/hottopics/insurance/nofault/>. To date, no state has adopted a pure no-fault regime, which would bar recovery for all noneconomic damages in all cases. *Id.* However, some states – like Colorado and Georgia – have reverted to traditional tort systems after their original no-fault experiments failed to provide expected benefits. *Id.* Despite this variety of approaches to no-fault, groups with a wide range of perspectives view Michigan's no-fault system as a good model that achieves good results. See, e.g., Consumers Union, *Consumers Union doesn't support the "Auto Choice" Reform Act: Don't get taken for a ride: Reject auto choice*, April 30, 1998 (visited March 5, 2004) <http://www.consumersunion.org/finance/0430auto.htm>; J. Robert Hunter, *Auto insurance rates in New York too high, better regulation, change in no-fault law needed*, Consumer Federation of America, November 12, 2003 (viewed March 5, 2004) <http://www.consumerfed.org/111203autoinsurance.html>; Lawrence W. Reed, Mackinaw Center for Public Policy, *Repeal the Sunset (of No-Fault Insurance Law)* (visited March 5, 2004) <http://www.mackinac.org/article.asp?ID=185>.

This positive view of Michigan's no-fault system and its good performance is not the product of mere luck. Rather, Michigan has incorporated the most important aspects of any no-fault legal regime in this context: a workable threshold that fulfills the aims of the no-fault program, a stable and predictable liability regime, and deterrence of harm. Michigan's system, incorporating each of these elements, relies equally on the interrelated first-party and third-party

components. This system strikes a delicate balance that can be preserved with *Kreiner II's* interpretation of serious impairment for the no-fault threshold, or completely disrupted if this Court interprets the definition of a serious impairment in MCL 500.3135(7) to raise the threshold. This, of course, is why CPAN urges this Court to adopt *Kreiner II's* analysis.

A. Workable Threshold

No-fault programs address any number of subjects. Some notable examples of no-fault programs include divorce, MCL 552.6, at the state level and the National Vaccine Injury Compensation Program, 42 USC 300aa-1 *et seq.*, at the federal level. The success and failure of these and other no-fault programs, which encompass many cases each year, depend a great deal on the way their respective thresholds provide the relief sought on a consistent basis, without difficult proofs, and in accordance with the aims of the legislation.

For instance, Michigan's Legislature has made the threshold for divorce particularly easy to cross, prescribing the sole allegations necessary to state the grounds for divorce. See MCL 552.6. Generally speaking, this threshold serves the purpose of allowing the divorce process to focus on the needs of the parties, and their children, rather than sorting out the complicated circumstances of a marriage and the parties' behavior within that relationship. See *Papatriantafyllou v Papatriantafyllou*, 432 Mich 921, 924, n 4; 442 NW2d 139 (1989), quoting *Dixon v Dixon*, 107 Wis 2d 492, 502-503; 319 NW2d 846 (1982). In the National Vaccine Injury Compensation Program, Congress has made it equally easy to seek compensation for vaccine injuries by prescribing a table of known injuries that result from covered vaccines and prescribing the documentation needed for compensation. See 42 USC 300aa-11; 42 USC 300aa-14. This scheme seeks to encourage the use of vaccines as an important public health measure

by making compensation freely available. See *In re Swine Flu Immunization Products Liability Litigation*, 533 F Supp 703, 725-728 (DC Utah, 1982).

The threshold for Michigan's automobile no-fault laws is no less calculated to provide the relief sought on a consistent basis, without difficult proofs, and in accordance with the aims of the legislation as these other programs. The purpose of the verbal threshold is not merely to eliminate overcompensation of minor injuries, as Fischer contends, but to prevent under compensation of serious injuries as well, and to provide such compensation quickly and efficiently. As this Court said in *Shavers v Attorney General*, 402 Mich 554, 579; 267 NW2d 72 (1978):

> The act's personal injury protection insurance scheme, with its *comprehensive and expeditious benefit system*, reasonably relates to the evidence advanced at trial that under the tort liability system the doctrine of contributory negligence denied benefits to a high percentage of motor vehicle accident victims, *minor injuries were overcompensated, serious injuries were under-compensated*, long payment delays were commonplace, the court system was overburdened, and those with low income and little education suffered discrimination. [Emphasis added.]

This is a balanced view of the purpose the verbal threshold serves in determining which plaintiffs may be compensated for noneconomic damages. At the moment, under the *Kreiner II* decision, Michigan has an equally balanced view of what constitutes a serious impairment, preventing the extremes of over- and under compensation. To raise the verbal threshold in this case would upset this delicate balance by raising the threshold, directly thwarting the legislative purpose of preventing under compensation of victims who sustain a serious impairment of a body function. See *DiFranco*, *supra* at 55 ("Although § 3135[1] was designed to eliminate lawsuits seeking noneconomic damages for minor injuries, it cannot be said that the Legislature intended to wipe out almost all noneconomic loss cases."); see also *Citizens Ins Co of America v Tuttle*, 411 Mich

536, 309 NW2d 174 (1981) ("[T] the no-fault act was not intended to work a comprehensive abolition of all tort liability incident to a motor vehicle accident."). While generous first-party benefits assist plaintiffs in handling the economic losses that result from an accident, they do not attempt to address the noneconomic damages left to the third-party aspect of the no-fault system.

At a practical level, there is little question that, with a subjective, verbal threshold required under the language of MCL 500.3135, courts will always have to grapple with some difficult issues. While further clarification of a legal standard is always desirable, it is and will always be virtually impossible to find a more precise way to describe a serious impairment standard than the Court of Appeals was able to do in *Kreiner II*. This sort of problem surrounding proof was predictable from the start when the Michigan Legislature adopted a verbal threshold instead of a purely objective monetary threshold, which is so prone to fraud and manipulation. See *No-fault auto insurance, supra*. Thus, the trade-off for this better form of a no-fault threshold in this situation requires allowing plaintiffs to use the evidence necessary to establish the existence of a serious impairment to avoid making this liability scheme so inflexible that Michigan reverts to the harshly anti-compensation environment of the *Cassidy* era. See *DiFranco*, *supra* at 59-60.

The fact that other no-fault systems, such as for divorce and vaccine injuries, recognize the important goal of providing prompt and fully adequate relief in their respective contexts only demonstrates that balance and flexibility is critical to the success of no-fault programs in general. Indeed, had the Michigan Legislature chosen a different balance between over and under compensation, or no balance at all, it could have chosen to abolish the right to recover noneconomic damages. Having not done so, it is incumbent on this Court and the other courts that interpret and apply MCL 500.3135 to give a meaning to a serious impairment that continues

to serve the overall goals of this legislation, which clearly includes leaving the verbal threshold as the flexible tool for determining who shall receive compensation for noneconomic damages, and not merely for eliminating these damages altogether.

B. Stable And Predictable Liability Regime

In examining the statutory question in this case, this Court is likely mindful of the volatility surrounding the no-fault system in the years between the *Cassidy* decision and Act 222. Unlike California, the referendum and initiative system in Michigan is not nearly so frequently used, and yet it was used twice within a short time with respect to the same area of law. Further, two major Supreme Court cases charted substantially different courses for a single area of law within an equally short period. That the Legislature was able to pass Act 222 after so much time is not merely a reflection of a consolidation of political power within Michigan government, but also a reflection of the fact that the Legislature was seeking stability and predictability within the no-fault arena. And, it did so through compromise. It did not simply enact *Cassidy*.

To raise the threshold now would upset the stability and predictability of compensation that currently exists, prompting another round of attempts to pass new legislation by all available means. This instability is undesirable from virtually all perspectives, and certainly from the perspective of the courts, which would have to shift the way they handle these cases yet again. Moreover, no-fault programs generally seek to make an area of law stable and predictable by eliminating considerations related to fault. See, generally, *Papatriantafyllou*, *supra*. It is no less reasonable that no-fault programs should also seek to achieve this stability and predictability by adopting a middle-ground that does not require extreme interpretations of one variety or another, and therefore encouraging consistent interpretations of the legal regime itself. *Kreiner II's* approach to serious impairment maintains the stability and predictability of the system while also

being defensible under the plain language of MCL 500.3135, and therefore should be adopted in this case.

C. Deterrence

A substantial basis for maintaining liability for damages for noneconomic injuries under Michigan's no-fault act is to deter harm. Simply put, raising the verbal threshold would immunize more wrongdoing, forcing victims to absorb the costs of their injuries and reducing the deterrent effect liability provides.

Studies have demonstrated that eliminating tort recovery undermines deterrence. See, e.g., Elisabeth M. Landes, "Insurance, Liability, and Accidents: A Theoretical and Empirical Investigation of the effect of No-Fault Accidents," 25 J Law & Econ 49 (1982) (adopting no-fault laws may have increased automobile accident deaths by as much as 15 percent). One commentator explained that in a no-fault system in which all costs are recoverable, and therefore internalized by the no-fault system, the effect on drivers would be minimal. *Id.* at 49. "However, if some losses are recoverable only if tort suits are permitted—for example, intangible losses such as 'pain and suffering' – then this result no longer holds." *Id.* at 49-50. In other words, when some losses are not recoverable, deterrence is undermined. Landes concluded that "states with tort restrictions have experienced significantly increased fatal accident rates relative to other states." *Id.* at 50. States with "relatively moderate restrictions on tort suits have had between 2 and 5 percent more fatal accidents as a result of adopting no-fault, while states with more restrictive laws have had as many as 10-15 percent more fatal accidents." *Id.* Despite criticism of the Landes study, other recent studies also suggest that no-fault creates a disincentive for safe driving. See J. David Cummings, Mary A. Weiss, and Richard D. Phillips, *The incentive effects of automobile insurance*, Wharton Financial Institutions Center (August 16, 1999)

<http://216.239.41.104/search?q=cache:hGSpDtRvzBUJ:fic.wharton.upenn.edu/fic/papers/99/9938.pdf+Michigan+auto+no-fault+no+moral+responsibility&hl=en&ie=UTF-8>.

Deterrence of harmful behavior is not only a lawful and therefore proper goal of the law, but also one of its beneficial effects. See, generally, *Weymers v Khera*, 454 Mich 639, 652-653; 563 NW2d 647 (1997); *People v Snow*, 386 NW2d 586, 592; 194 NW2d 318 (1972); see also *Ross v Consumers Power Co*, 420 Mich 567, 662, n 3; 363 NW2d 641 (1984) (Levin J., dissenting); Frank A. Sloan, *Tort liability versus other approaches for deterring careless driving*, 14 Int'l Rev L & Econ 53, 60, 66, 69 (1994); Gary T. Schwartz, *Reality in the economic analysis of tort law: Does tort law really deter?* 42 UCLA L Rev 377 (1994) (highlighting public-policy value that can flow from even the moderate deterrence that the tort system can provide). There can be no doubt that the Legislature struck a compromise when it permitted unlimited recovery for economic losses, like medical expenses, in the first-party system, but limited recovery for noneconomic losses in the third-party system. That the Legislature preserved the possibility of recovering for noneconomic losses in the third-party system only underscores the importance that deterrence plays in maintaining safety. If this Court raises the verbal threshold, making it virtually impossible to recover noneconomic losses, drivers will have no incentive for driving safely. This could not be the Legislature's goal when it decided to permit third-party claims.

VII. CONCLUSION

For the foregoing reasons, Amicus Curiae CPAN respectfully requests that this Court grant its request for oral argument, affirm the Court of Appeals in *Kreiner*, and grant whatever other relief is just and equitable.

Respectfully submitted,

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Dated: March 8, 2004